Supreme Court, U.S.
FILED
JUL 31 1996
CLERK

No. 95-1855

In The

Supreme Court of the United States

October Term, 1995

GERALD G. BARTON AND WILLIAM W. VAUGHAN, III

Petitioners,

v.

LANDMARK LAND COMPANY OF CAROLINA, INC., A DELAWARE CORPORATION, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS GERALD G. BARTON AND WILLIAM W. VAUGHAN, III IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

M. Dawes Cooke, Jr.
Robert P. Gritton
Barnwell Whaley Patterson & Helms, LLC
134 Meeting Street, Suite 300
Charleston, South Carolina 29401
(803) 577-7700

Attorneys for the Petitioners Gerald G. Barton and William W. Vaughan, III

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

6 PP

COME NOW Petitioners, Gerald G. Barton and William W. Vaughan, III, and submit this Supplemental Brief pursuant to Rule 15.7 of the Rules of the Supreme Court of the United States. On May 15, 1996 Petitioners Gerald G. Barton, William W. Vaughan, III and Joe W. Walser filed the instant Petition for Writ of Certiorari in this Court. On June 19, 1996 Petitioner Joe W. Walser moved to dismiss his Petition, and the Court granted his motion on July 10, 1996. The remaining Petitioners now file this Supplemental Brief to address the significance of the Court's recent decision in *United States v. Winstar Corporation*, ___ U.S. ___, ___ S. Ct. ___, 64 U.S.L.W 4739 (S.Ct. Op. No. 95-865, decided July 1, 1996).

DISCUSSION

In *Winstar* this Court held that the Government can be required to pay damages for breach of agreements to allow entities acquiring weak savings and loans to count supervisory goodwill towards capital reserve requirements imposed by federal regulations, notwithstanding that the later-enacted Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) forbids that practice. The Court's decision in *Winstar* is significant to the instant Petition for a Writ of Certiorari because it implicitly rejects the premise underlying the decision below in this case, which is that FIRREA broadly displaces rights previously conferred by the Government. In *Winstar* those rights were conferred by contract; in this case they were conferred by the Bankruptcy Act.

The Federal Home Loan Bank Act created the Federal Home Loan Bank Board ("Bank Board"), which was authorized to channel funds to thrifts for loans on houses. The Home Owners' Loan Act of 1933 authorized the Bank Board to charter and regulate Federal Savings and Loan Associations. The National Housing Act created the Federal Savings and Loan Insurance Corporation ("FSLIC"), under the Bank Board's authority, with responsibility to insure thrifts' deposits and to regulate all federally insured thrifts. The resulting regulatory scheme worked reasonably well until the combination of high interest rates and inflation in the late 1970's and early 1980's brought about a new crisis in the thrift industry.

In an effort to save failing thrifts, the Bank Board and FSLIC entered into agreements with various entities to acquire failed thrifts. Glendale Federal Bank, FSB, Winstar Corporation, and the Statesman Group, Inc. ("plaintiffs"), were three such entities that acquired failed thrifts in the 1980's pursuant to agreements with the Bank Board and the FSLIC. Included in those agreements were provisions allowing the plaintiffs to count the supervisory goodwill created in the merger transactions toward regulatory capital requirements.

Subsequently, Congress passed FIRREA in an attempt to set new regulatory guidelines for the ailing thrift industry. The impact of FIRREA's new capital requirements upon institutions that had acquired failed thrifts in exchange for supervisory goodwill was swift and severe. With the object of preventing the collapse of the thrift industry, FIRREA made enormous changes in the structure of the federal thrift regulation by 1) abolishing the

FSLIC and transferring its functions to other agencies; 2) creating a new thrift deposit insurance fund under the Federal Deposit Insurance Corporation ("FDIC"); 3) replacing the Bank Board with the Office of Thrift Supervision ("OTS"), a treasury department office with responsibility for the regulation of all federally insured savings associations; and 4) establishing the Resolution Trust Corporation ("RTC") to liquidate or otherwise dispose of certain closed thrifts and their assets. More importantly to the plaintiffs, FIRREA also obligated the OTS to prescribe and maintain uniformly applicable capital standards for savings associations in accord with strict statutory requirements, including excluding from core capital "unidentifiable, intangible assets," 12 U.S.C. § 1464 (T)(9)(a), such as supervisory goodwill. The OTS then promptly issued regulations implementing the new capital standards along with a bulletin noting that FIRREA "eliminates [capital and accounting] forebearances" previously granted to certain thrifts. The *Winstar* suit ensued.

The Supreme Court recognized and in fact recited the important public interests that FIRREA serves. The Court also acknowledged the various immunities that preserve the prerogative of the Government to legislate in the public interest. The Court nevertheless held that a contract is an agreement to allocate risks of future events, which can be honored without damaging the Government's ability to legislate as it sees fit. Implicit in the Court's decision in *Winstar* is that when the Government by contract confers rights upon private citizens, those rights survive and coexist with subsequent legislation,

even legislation as important and comprehensive as FIRREA. *A fortiori,* rights conferred by federal statute must also survive and coexist with FIRREA. Petitioners contend that their exercise of rights under the Bankruptcy Act should not be regarded as an act of bad faith merely because such exercise is regarded as an "attempt to undermine the regulatory authority" of the OTS. *See Landmark Land Company of Carolina, Inc., a Delaware Corp., et al. v. Barton, et al.,* 76 F.3d 553, 565 (4th Cir. 1996). To hold otherwise is to accord FIRREA preemptive effect far beyond what the Supreme Court has so far recognized.

Respectfully submitted,

BARNWELL WHALEY PATTERSON & HELMS
M. DAWES COOKE, JR. (#288)
ROBERT P. GRITTON
134 Meeting Street, Suite 300
P.O. Drawer H
Charleston, South Carolina
29402-0197
(803) 577-7700

Attorneys for the Petitioners
Gerald G. Barton and
William W. Vaughan, III

DATED: July 30, 1996
Charleston, South Carolina